APR 11 1941
CHARLES ELMORE CROPLEY
CLERK

No. 940

In the Supreme Court of the United States

October Term, 1940.

UNITED STATES OF AMERICA, EX REL. JOSEPHINE JUMP, *NEE* STRIKEAXE, AND JOE S. McGUIRE, GUARDIAN OF JAMES STRIKEAXE, AN INCOMPETENT,

Petitioners,

vs.

HAROLD L. ICKES, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

NEAL E. McNEER,
1132 Woodward Building,
Tulsa, Oklahoma,
SETH W. RICHARDSON,
918 Fifteenth Street,
Washington, D. C.,
Attorneys for Petitioners.

INDEX.

PAGE

Petition for writ of certiorari 1
Jurisdiction 2
Statute involved 2
Questions presented 2
Statement 3
Specifications of error 9
Reasons for granting the writ 9
Brief in support of petition for writ of certiorari 11
Appendix "A" (Secs. 1 and 6, Osage Allotment Act) . 24-25

TABLE OF CASES.

Ansehl v. Puritan Pharmaceutical Co., (C. C. A.) 61 F. (2d) 131 13
Bronk v. Charles H. Scott Co., (C. C. A.) 221 Fed. 338 . . 13
Brown v. Hitchcock, 173 U. S. 473, 19 S. Ct. 485 12
Brown v. United States, 113 U. S. 568, 571, 5 S. Ct. 648, 28 L. ed. 1079 20
Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192. 16
Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 99, 40 S. Ct. 504, 64 L. ed. 801 20
De Ruiz v. De Ruiz, 88 F. (2d) 752 17
Duncan Townsite Co. v. Lane, 245 U. S. 308, 38 S. Ct. 99 . . . . . 12, 14, 19
Ellis v. Jump, 100 F. (2d) 130 22
Garfield v. Goldsby, 221 U. S. 249, 29 S. Ct. 62 12
Gritts v. Fisher, 224 U. S. 640, 32 S. Ct. 580 15
Heckman v. United States, 224 U. S. 413, 32 S. Ct. 424 . . 22
Houghton v. Payne, 194 U. S. 89, 24 S. Ct. 590, 48 L. ed. 888 20
Ickes v. Pattison, 65 App. D. C. 116, 80 F. (2d) 708 . . 13, 18
In re Heff, 197 U. S. 488, 25 S. Ct. 506 13
Kansas v. Colorado, 185 U. S. 125, 22 S. Ct. 522 . . . 12, 13
Kenny v. Miles, 250 U. S. 58, 39 S. Ct. 417 . . . . . 12, 17
LaRoque v. United States, 239 U. S. 62, 36 S. Ct. 22 . . . 15
Levondale Lead & Zinc Co. v. Coleman, 241 U. S. 432, 36 S. Ct. 644 12
Logan v. Davis, 233 U. S. 613, 627, 34 S. Ct. 685, 5 L. ed. 1121 20
Memohah v. Schaffer Oil Co., 30 F. (2d) 665 12

PAGE

Merritt v. Cameron, 137 U. S. 542, 551, 552, 11 S. Ct. 174, 34 L. ed. 772 20
Oklahoma Oil Co. v. Bartlett, 236 Fed. 488 21
Red Wing Malting Co. v. Willicuts, 15 F. (2d) 626 (8 C. C. A.) 17
Reconstruction Finance Corp. v. Central Republic Trust Co., (D. C.) 11 Fed. Sup. 976 . . . . . 12, 17
Studebaker v. Perry, 184 U. S. 258, 268, 22 S. Ct. 463, 46 L. ed. 528 20
Tiger v. Twin States Oil Co., 48 F. (2d) 509 . . . . . 12, 22
United States, ex rel. Turner, v. Fisher, 222 U. S. 204, 32 S. Ct. 37 . . . . . 12, 14, 19
United States v. Alabama R. R. Co., 142 U. S. 615, 621, 12 S. Ct. 306, 35 L. ed. 1134 20
United States v. Dern, 289 U. S. 352, 53 S. Ct. 614 14
United States v. Dickson, 15 Pet. 141, 161, 10 L. ed. 689. 20
United States v. Goldenberg, 168 U. S. 95, 18 S. Ct. 3 . . 16
United States v. Healey, 160 U. S. 136, 145, 16 S. Ct. 247, 40 L. ed. 369 20
United States v. Mo. Pac. Ry. Co., 278 U. S. 269, 49 S. Ct. 133 . . . . . 16, 20
United States v. Wildcat, 244 U. S. 111, 37 S. Ct. 561 . . 12
Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 30 S. Ct. 10 22
Webster v. Fall, 266 U. S. 507, 45 S. Ct. 148 13
White v. Federal Radio Corp., (D. C.) 29 F. (2d) 113 . . 13

STATUTES CITED.

Act of March 3, 1875 (18 Stat. 449) 4
Act of August 19, 1890 (36 Stat. 336) 4
Act of June 19, 1934 (48 Stat. L. 1064) 20
Judicial Code, Sec. 240 (a), as amended by the Act of February 13, 1925 (Chap. 225, 43 Stat. L. 938, 28 U. S. C. A. 347) 2
Osage Allotment Act of June 28, 1906 (34 Stat. L. 539) 2, 5, 7, 11, 24-25
U. S. Supreme Court Rule 8, Par. (c), effective Sept. 1, 1938 . . . . . 9, 19
U. S. Supreme Court Rule 38, Par. 5, Subd. (c) 2

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1940.

No. .....

UNITED STATES OF AMERICA, *EX REL.* JOSEPHINE JUMP, *NEE* STRIKEAXE, AND JOE S. McGUIRE, GUARDIAN OF JAMES STRIKEAXE, AN INCOMPETENT,

Petitioners,

vs.

HAROLD L. ICKES, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES,

Respondents.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the District of Columbia, affirming the judgment of the United States District Court in and for the District of Columbia. Petition for rehearing was denied February 15, 1941.

The judgment of the District Court, dated March 6, 1940, sustained the motion to dismiss the petition, and appears in the record, pages 38-39. The opinion of the Circuit Court of Appeals is not reported, but appears in the record, pages 43-50.....

Jurisdiction.

The judgment of the Circuit Court of Appeals denying the petition for rehearing was entered February 15, 1941. The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (Chap. 225, 43 Stat. L. 938, 28 U. S. C. A. 347) and subdivision (c) of paragraph 5 of Rule 38 of this court.

Statute Involved.

The statute involved is the Osage Allotment Act of June 28, 1906, (34 Stat. L. 539) sections one and six, *infra* (pages 24-25).

Questions Presented.

1. The interpretation and application of sections 1 and 6 of the Osage Allotment Act (34 Stat. L. 539):

(a) The power and authority of the Secretary of the Interior in compiling the Osage roll provided for by said act, to strike or eliminate names from the declared roll without notice or an opportunity to be heard essential to due process of law to those affected thereby;

(b) Error of court, upon motion, in dismissing a petition that concededly states a *prima facie* case for mandamus to restore the name of an Osage member that has been stricken or eliminated from the compiled roll by the unauthorized act of respondent's predecessor, based upon speculative defenses not pleaded or admitted.

(c) Whether the court, in considering the statute effective June 28, 1906, which provides in plain language the tribal roll in the office of the Osage Indian Agency as it existed on January 1, 1906, is declared to be the roll of the tribe and to constitute the legal membership there-

of for the purpose of the act, without any distinctive mention of whether the persons are living or deceased, except in a subsequent section it is provided the benefits provided for of any deceased member of the tribe shall descend to his heirs, may, upon motion to dismiss, enter into speculative fields in search of meaning different from the plain language employed to raise a doubt to resort to construction, and then substitute construction for legislation and read into the statute language not therein contained.

(d) Whether the court upon motion to dismiss may consider affirmative defenses not admitted nor apparent from the record, to-wit: *(1)* Administrative construction of the statute; *(2)* inequitable consequences based upon laches.

Statement.

The petitioners instituted this action in their own behalf against respondent in his official capacity to restore certain rights and benefits conferred under the Osage Allotment Act, *supra,* of which they, as heirs of Bennie Strikeaxe, have been deprived by the predecessor of respondent acting wholly without authority of law in that he arbitrarily eliminated the name of Bennie Strikeaxe from the compiled roll designated by Congress, without notice or an opportunity to be heard essential to due process of law. (R. 1-23) The respondent filed a motion to dismiss. (R. 24-25) The facts, as disclosed by the petition (R. 1-23), are admitted by the motion and are as follows:

Petitioners are full-blood Osage Indians, children and sole heirs of Bennie Strikeaxe, now deceased, whose name appears upon the tribal roll of the Osage tribe of Indians as shown by the records of the United States at the Osage

Agency as it, the said roll, existed on the first day of January, 1906.

The mineral rights of the Osage tribe in said lands have been segregated and the title is in the United States and held in trust for the use and benefit of the tribe. (R. 2-3) The United States, by treaties and statutes, became obligated to pay the Osage tribe annuities and interest on money and to furnish supplies which have been distributed through the office of the Osage Indian agent; that section 4 of the Act of March 3, 1875 (18 Stat. 449), made it the duty of Indian agents to prepare an annual roll of members of the various tribes entitled to supplies; section 10 of said act made it the duty of the agent to keep a book of itemized expenditures and receipts and to forward quarterly a transcript of said book, with all notations thereon, to the Commissioner of Indian Affairs. The Act of August 19, 1890, (36 Stat. 336) directed the Secretary of the Interior to make quarterly payments of interest to members of the tribe. Thereafter, prior to each quarterly payment, the Osage agent prepared in triplicate rolls of the Osages on forms furnished by the Government, designated as the March, June, September and December Annuity Payrolls of each respective year and, when completed, said rolls constituted a roll of the tribe and the book of itemized expenditures as contemplated by section 10 of the Act of March 3, 1875 (R. 3-4); at the end of each quarter, one of the duplicate rolls was certified by the agent and forwarded to the Commissioner of Indian Affairs, and the other remained in his office.

The Secretary of the Interior on April 1, 1904, promulgated rules and regulations for revising said rolls. Sections 5 and 6 provided that all deceased Indians would be carried on the roll for one payment after death and the roll was revised each quarter in conformity with said rules afore-

said. (R. 4-5) The name of Bennie Strikeaxe had been upon the roll for many years and, after the adoption of said rules, was transcribed upon each roll during the years 1904 and 1905, being on the September, 1905, roll opposite Roll No. 582 and on the December, 1905, roll on page 13 thereof, opposite Roll No. 588, which disclosed the per capita payments of Bennie Strikeaxe and his son were receipted for by Foster Strikeaxe on December 13, 1905; and, under the heading "remarks" opposite the name of Bennie Strikeaxe, appears the notation, "588 Crazy." A photostat copy of page 13 of said roll as it existed on January 1, 1906, is attached to the petition as Exhibit "A." (R. 18) A duplicate of said roll and record was duly certified to on the last day of December, 1905, by the agent and forwarded to the Commissioner of Indian Affairs. The above constituted the official rolls and records of members of the Osage tribe up to and including the 6th day of March when the March, 1906, roll was prepared. (R. 5-7) No official record was kept of deaths of members, but said agent did keep an unofficial record of deaths after April 1, 1904, and on January 1, 1906, the record contained a list of 242 deaths but it did not include the name of Bennie Strikeaxe; that with the tribal roll and record of deaths existing as above set forth as of January 1, 1906, the Osage Allotment Act, *supra,* was introduced in Congress on February 21, 1906, and was passed and became a law on June 28, 1906. (R. 8-9-10)

The only power conferred upon the Secretary of the Interior to strike names from the roll was set forth in the proviso to section 1 of said act, *supra,* and limited to persons contained in a list filed by the principal chief of the tribe with the Secretary of the Interior, contending they were on the roll by fraud; no list was filed as to Bennie Strikeaxe. That in revision of the roll, it became the legal duty of the Secretary to transcribe the name of Bennie

Strikeaxe on the revised roll as a member of the tribe. (R. 10-11) The Secretary of the Interior in preparing a revised roll, through the Commissioner of Indian Affairs, directed a letter to the United States Indian Agent at the Osage Agency, dated January 30, 1908, to prepare in triplicate a complete roll of the Osage tribe of Indians and to include thereon the names of the tribal roll as it existed on January 1, 1906. (R. 12-13)

The Osage agent, in so far as he was directed to transcribe in triplicate the names from the tribal roll as it existed on January 1, 1906, was directed to perform purely a ministerial act. However, in violation of the instructions of the Commissioner of Indian Affairs, and without authority of law, he incorrectly transcribed a list of names from the tribal roll as it existed on January 1, 1906, and erroneously and without authority of law and in violation of the instructions of his superior omitted the name of Bennie Strikeaxe from said list, and erroneously certified the roll prepared by him contained all the names of the tribal roll as shown by the records in the specified office as it existed on January 1, 1906, when in truth and in fact said roll was incorrect as it did not contain the name of Bennie Strikeaxe which appeared upon the roll as above set forth; that by reason of the facts heretofore stated, the act of the Secretary in approving the revised roll on April 11, 1908, in so far as it eliminated the name of Bennie Strikeaxe, was illegal and void as said Secretary, under the act, had no authority or jurisdiction to eliminate said name in said manner. (R. 13-14)

That petitioners are wards of the United States and their property rights are derived from membership or inheritable interests in the Osage tribal property and are now and have been at all times in the past held, managed and controlled by the Secretary of the Interior under authority

conferred by Acts of Congress; that the United States at all times prior to June 28, 1906, and at all times thereafter has maintained an agent or superintendent of the Osages at the Osage Agency and, among the duties of said agent, has been the duty to look after, protect and care for the property rights of the Osage Indians; that in addition to being wards of the Government, petitioners, at the time of the passage of the Osage Allotment Act, were full-blood minors of tender years and the petitioner, James Strikeaxe, has been an incompetent ever since reaching his majority; that neither of said parties had any knowledge of the facts regarding the enrollment of their father or of his name appearing upon the tribal roll of the Osages as shown by the records of the Osage Agency on January 1, 1906; that the first knowledge they had was a short time before filing suit when they employed counsel to make an investigation and, in employing counsel, petitioners being full-blood Osages, their contract with their attorney was duly submitted and approved by the Secretary of the Interior with full knowledge that said attorney was employed to make an investigation to take such steps or necessary action as to enforce their rights. These petitioners have no remedy, legal or equitable, except by mandamus; that petitioners seek relief to require respondent: *(a)* to recognize the name of Bennie Strikeaxe on the final roll of the Osage tribe of Indians and, if necessary, to recompile said roll and include the name of Bennie Strikeaxe therein in accordance with the Act of June 28, 1906, *supra,* and to pay to petitioners as the lawful heirs of their deceased father their share in all future payments made to the Osage Indians to which their father would have been entitled if living; *(b)* to pay petitioners out of the applicable funds of the Osage tribe of Indians now on hand or that may be hereinafter received, an amount equal to the per capita shares of all annuities and other

payments made to members of the Osage tribe accruing to them under and by virtue of the Act of June 28, 1906, or, in lieu of said payments, to place said amount to their credit to be held and expended for their benefit as other restricted Indians.

The respondent's motion to dismiss (R. 24-25) is based upon the following grounds: *(1)* The Act of June 28, 1906, *supra,* deprived the court of jurisdiction; *(2)* failure to allege Bennie Strikeaxe was alive on January 1, 1906; *(3)* failure to join all members of the Osage tribe as defendants; *(4)* petition is without equity in that the tribal roll which it seeks to open and reform has been final since 1908 and has been the basis upon which tribal lands have been allotted and many millions of tribal funds have been distributed over a period of 29 years; and *(5)* petition is bad in substance in that it contains no prayer for specific relief. The trial court dismissed without specifying the particular grounds. (R. 38-39)

On appeal the Circuit Court of Appeals held the Act of June 29, 1906, *supra,* did not deprive the court of jurisdiction under the facts alleged in the petition and that the petition stated a *prima facie* case for relief. Although holding the petition stated a *prima facie* case for relief, the court held the relief by mandamus, not being a writ of right, could be denied upon equitable grounds or affirmative defenses, although not pleaded or admitted, and affirmed the judgment of the trial court.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In the interpretation and application of section 1 of the Osage Allotment Act, *supra,* in so far as it applies to the roll of the tribe, by reading into the statute language not therein contained;

2. That upon motion to dismiss, after holding the petition stated a *prima facie* case for mandamus, in not reversing the judgment of the trial court;

3. Upon motion to dismiss in considering affirmative defenses neither pleaded nor admitted and thereby depriving petitioners of the right to controvert the facts relied upon or to be heard thereon.

Reasons for Granting the Writ.

1. The court has decided a question of substance relating to the construction and application of the Osage Allotment Act which has not been, but should have been settled by this court, as the Court of Appeals has in the application of a plain and unambiguous statute resorted to construction and, in so doing, substituted construction for legislation and read into the statute language not therein contained.

2. When the Circuit Court of Appeals held the petition stated a *prima facie* case for relief, it became the duty of the court to reverse the judgment of the trial court. The failure of the court to do so involves a question of general importance and does not give proper effect to applicable decisions of this court but, in effect, has nullified paragraph (c) of rule 8 of this court effective September 1, 1938.

3. The Circuit Court of Appeals has not given proper effect to the applicable decisions of this court to the effect

that, upon motion to dismiss the court may not decide speculative affirmative defenses, neither pleaded nor admitted, nor apparent from the face of the petition. The question involved is of general importance in that the procedure adopted by the court deprives petitioners of the right to be heard essential to due process of law.

Wherefore, petitioners respectfully pray that a writ of *certiorari* issue to the United States Circuit Court of Appeals.